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Advisory Council on
Historic Preservation

2 Memorandum: Information Regarding Suspension of Portions of 36 CFR Part 800

Issued July 16, 1982

The following is a list of Section 106 Updates which have been published to assist Federal agencies in carrying out the requirements of Section 106 of the National Historic Preservation Act of 1966.

1 Supplementary Guidance:
Preparation of Memoranda of Agreement
Issued July 9, 1982

2 Memorandum:
Information Regarding Suspension of Portions of 36 CFR Part 800
Issued July 16, 1982

Section 106 Updates are prepared in 3-hole punched form, for easy filing and reference in a ring binder. For further information, write: Advisory Council on Historic Preservation, 1522 K Street, NW, Suite 430, Washington, D.C. 20005.

The Advisory Council on Historic Preservation serves as a primary policy advisor to the President and Congress on matters of historic preservation. An independent agency, the Council was established by the National Historic Preservation Act of 1966.

Responsibilities of the 19-member body include advising other Federal agencies to ensure that their actions are carried out with consideration to preserving the Nation's historic resources.

Memorandum:
Information Regarding Suspension of Portions of 36 CFR Part 800

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July 16, 1982

Memorandum

To: Federal Liaison Officers and State Historic Preservation Officers

From: Executive Director, Advisory Council on Historic Preservation

Subject: Information Regarding Suspension of Portions of 36 CFR Part 800

On July 6, 1982, the Council temporarily suspended three sections of its regulations, "Protection of Historic and Cultural Properties" (36 CFR Part 800). Suspension of these provisions eliminates several requirements of the current Section 106 process, resulting in a more flexible procedure. This memorandum provides information on the interpretation of the regulations, in view of this suspension.

I. Section 800.4(a)(4)

Suspension of this section, which concerns the timing of eligibility determinations in the Section 106 process, permits the following improvements.

A. Agencies may request the Council's comments prior to formally requesting an eligibility determination under 36 CFR Part 63.

Comment: In most cases a request for a determination of eligibility may be made at any time after the Section 106 process has begun. If the Agency Official and the SHPO agree that a property appears eligible for the National Register, the Agency Official may assess the effect of the undertaking [Sections 800.4(b), (c), and (d)], make a Determination of No Effect, No Adverse Effect, or Adverse Effect, as appropriate, and proceed to complete the Section 106 review in accordance with Section 800.6. However, if there is a question regarding eligibility, the Agency Official should seek the Secretary of the Interior's determination before requesting Council comments so that the question is clearly resolved before going further in the process. This will prevent unnecessary application of the review process to properties that are not eligible for the National Register.

B. The Council may conclude its role in the commenting process before the determination of eligibility process specified in 36 CFR Part 63 is completed.

Comment: This means that the Council may accept a No Adverse Effect Determination, with or without conditions [§800.6(a)], conclude a Memorandum of Agreement [§800.6(b) and (c)], or comment [§800.6(d)] without the Agency Official completing the procedural requirements of 36 CFR Part 63. So long as the Council has sufficient information on the properties to make informed judgments regarding effects and mitigation, such information need not be based on a formal determination of

eligibility. When that information is inadequate, the Council may decline to complete the commenting process until the Secretary has made a final determination respecting eligibility. Note that Section 800.4(a)(3) has not been suspended and the Agency Official is required to request an eligibility determination pursuant to 36 CFR Part 63 whenever a property appears to meet the National Register Criteria or a question exists. In that event, the request for a determination must be made to meet the agency's responsibilities under 36 CFR Part 800. Once the request is made, the Agency Official has satisfied §800.4(a)(3). However, the Agency Official has the legal requirement to comply with 36 CFR Part 63 and acts at his own peril if those independent procedural requirements are not met.

C. To comply with Section 106 agencies may establish processes to take into account the effects of an undertaking on historic properties yet to be identified.

Comment: Suspension of Section 800.4(a)(4) eliminates the requirement that all preceding steps relating the identification [§800.4(a)(1)-(3)] be completed prior to requesting the Council's comments. This introduces a new element of flexibility into the consultation process. When an Agency Official knows there will be effects on historic properties but those properties have not been fully identified, the consultation process may be initiated and the Council's comments obtained, provided that sufficient information is available for the Council and other consulting parties to make informed judgments. The objective in such cases will be to establish a process for identifying historic properties, evaluating effects, and implementing migitation measures. By following the resulting comments, the Agency Official will have taken the project effects into account.

II. Section 800.6(c)(1)

Suspension of this section eliminated the requirements relating to preparation of Memoranda of Agreement (MOA). Supplementary guidance for this area was published in the Federal Register on Friday, July 9, 1982, 47 FR 29861. This guidance is available in printed form (without charge) from the Council; it is titled Section 106 Update/1: Preparation of Memoranda of Agreement. While this guidance covers the preparation of MOAs, it should be noted that existing provisions relating to the use of an MOA [§800.6(b)(5) and (6)], review of an MOA [§800.6(c)(2)], effect of an MOA [§800.6(c)(3)], amendments [§800.6(c)(4)], and reports [§800.6(c)(5)] remain operative.

III. Section 800.6(d)(2)(ii)

Suspension of this subsection eliminates the normal 60-day waiting period between the Chairman's decision to refer a case to the full Council and the actual meeting. The minimum time that must now elapse is governed by the requirement of Section 800.6(d)(3) that no less than seven days notice of a Council meeting appear in the Federal Register. The Council will generally follow the admonishment of that section to provide 21 days notice, unless good cause for meeting on shorter notice is demonstrated.

Robert R. Garvey, Jr.

Appendix A: Federal Register Notice, June 4, 1982

ADVISORY COUNCIL ON HISTORIC PRESERVATION

36 CFR Part 800

Protection of Historic and Cultural Properties

AGENCY: Advisory Council on Historic Preservation.

ACTION: Temporary suspension of certain regulations with request for comments.

SUMMARY: The Advisory Council on Historic Preservation temporarily suspends three sections of its regulations relating to protection of historic and cultural properties. The purpose of this suspension is to relieve agencies from certain paperwork requirements and time constraints which have been found to constitute an unnecessary regulatory burden.

DATE: These suspensions are effective on July 6, 1982. The Council invites comments during this 30-day period. The Council will consider any comments received before the effective date of this suspension and, if appropriate, modify the suspensions.

ADDRESS: Comments may be mailed to the Advisory Council on Historic Preservation, 1522 K Street, NW., Suite 430, Washington, D.C. 20005.

FOR FURTHER INFORMATION CONTACT: John Fowler, General Counsel, 202–254–3967.

SUPPLEMENTARY INFORMATION: Since the Council published its regulations at 36 CFR Part 800 (44 FR 6068, January 30, 1979), Congress and the President have instituted several measures directing federal agencies to reduce the paperwork burdens, time delays and other unnecessary constraints of their regulations. The Council has undertaken an extensive review of its regulations, initiated in June, 1981. While permanent amendments embodying fundamental changes in the Section 106 process are currently under consideration, the Council has identified certain areas where regulatory burdens can be alleviated until the amendment process is completed. The Council temporarily suspends three portions of its regulations which impose paperwork burdens and time constraints that the Council has found to be unnecessary. The suspension will be in effect until the Council completes amendment of its regulations or until further notice.

Section 800.4(a)(4) currently requires the Agency Official to seek from the Secretary of the Interior a formal determination of the eligibility of a property for inclusion in the National Register of Historic Places prior to completing the process set forth in the Council's regulations. The Department of the Interior is currently considering a modification to the determination of eligibility process that would streamline determinations when the State Historic Preservation Officer and an Agency Official agree a property is eligible. The Council has identified the requirements of Section 800.4(a)(4) as hindering this modification. The Council is suspending this regulation to coincide with the Department's intended reform and eliminate an existing regulatory burden.

Section 800.6(c)(1) sets out directions for the preparation of Memoranda of Agreement. In the Council's experience, this provision has served to draw out the Memorandum of Agreement process by creating an overly rigid procedure for preparation of documents. The Council is suspending this section to allow more flexibility, and hence greater expediency, in the preparation of Memoranda of Agreement. The Council intends to issue guidance for the preparation of Memoranda of Agreement in lieu of the suspended regulations. This guidance will provide suggestions for efficient and thorough preparation of Memoranda of Agreement without imposing procedural strictures that could delay the process.

Section 800.6(d)(2)(ii) requires a minimum 60-day waiting period for full Council review of an undertaking except in exceptional cases. In the Council's experience, the 60-day waiting period has proved to be an unnecessary delay and has usually been waived as specified in the regulations. The Council is suspending this provision to eliminate this delay and to allow the Council to consider an undertaking at the time best suited to all the participants in the process.

The Council has determined that each of these suspensions will relieve a burden on complying agencies and that none of these suspensions effect any substantive rights of any party to the section 106 process or the public. None of these sections are mandated by statute. The suspensions are consistent with the policies set forth in Section 2 of Executive Order 12291.

The Council has determined that this document is not a major rule under Executive Order 12291 and does not have a significant economic impact on a substantial number of small entities in accordance with the Regulatory Flexibility Act of 1980 (Pub. L 96–354).

The Council has determined that these suspensions do not have a significant effect on the quality of the human environment under the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.*, and that an environmental impact statement is not required.

The Council invites the public's comments on these temporary suspensions.

List of Subjects in 36 CFR Part 800

Historic preservation, Administrative practice and procedure.

Notice of Suspended Regulations

PART 800—PROTECTION OF HISTORICAL AND CULTURAL PROPERTIES

§ 800.4 and § 800.6 [Amended]

The regulations set forth in 36 CFR 800.4(a)(4), 800.6(c)(1) and 800.6(d)(2)(ii) are suspended until further notice.

Dated: May 28, 1982.

John Fowler,

Acting Executive Director.

[FR Doc. 82-15175 Filed 6-3-82; 8:45 am]

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